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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 MICROSOFT CORPORATION,

14 Plaintiff,

15 v.

16 MOTOROLA INC., et al.,

17 Defendant.

18 MOTOROLA MOBILITY, LLC., et al.,

19 Plaintiffs,

20 v.

21 MICROSOFT CORPORATION,

22 Defendant.

23 No. C10-1823-JLR

24 MICROSOFT'S RESPONSE TO THE
25 COURT'S SEPTEMBER 10, 2013
26 ORDER CONCERNING
MOTOROLA'S LITIGATION
EFFORTS IN GERMANY
(DKT NO. 913)

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1 **I. INTRODUCTION**

2 On April 19, 2013, the Court determined the worldwide RAND royalty rates for
 3 Motorola's 802.11 and H.264 SEPs. (Dkt. No. 673.) On June 5, 2013, Microsoft tendered to
 4 Motorola the approximately \$6.8 million in past RAND royalties that result from the Court's
 5 RAND determination, and undertook to make future royalty payments based on that ruling.
 6 (Dkt. No. 701 & Ex. A.)¹ Finally, on September 4, 2013, a jury found Motorola had breached
 7 its contracts with the IEEE and ITU—including by seeking injunctions on its 802.11 and H.264
 8 SEPs. (Dkt. No. 909.) Whatever Motorola is entitled to receive for Microsoft's use of the
 9 H.264 and 802.11 standards in its products will be determined in this case, based on the
 10 Court's RAND determination, the jury's verdict, and the resolution of Microsoft's claims for
 11 equitable relief. Accordingly, Motorola has no reason to maintain any other actions against
 12 Microsoft in any forum relating to alleged infringement of, or royalties owed for use of,
 13 Motorola's H.264 and 802.11 portfolios, other than to obtain relief that undermines the result
 14 here.

15 This summer, Motorola nevertheless renewed its strategy of using German proceedings
 16 to frustrate the efforts of this Court to set a worldwide RAND royalty. The Court previously
 17 enjoined Motorola from enforcing any injunction based on its H.264 SEPs in Germany (Dkt.
 18 No. 318), and replaced that order with a broader order enjoining “Motorola from seeking
 19 injunctive relief against Microsoft with respect to Motorola's H.264 and 802.11 standard
 20 essential patent portfolios” (Dkt. No. 607 at 18). While Motorola refrained from enforcing a
 21 German injunction, it did not drop its German H.264 lawsuits and even filed an additional
 22 German action.

23
 24
 25 ¹ In so doing, Microsoft fulfilled the commitment it made in writing in September 2011. (9/3/13 Tr. (Killough)
 10:17–1:14; Dkt. No. 95 at 9.)

1 As explained below, following the August 13, 2013 pretrial conference in this case,
 2 Motorola agreed to a stay of these German actions. Although the actions are improper and
 3 should not be maintained at all, so long as Motorola agrees to leave the stays in place, and to
 4 refrain from pursuing any other actions on its H.264 and 802.11 SEPs against Microsoft in any
 5 forum, without first seeking leave to do so from this Court, Microsoft does not believe action
 6 from this Court is required.

7 **II. MOTOROLA'S CONTINUED PROCEEDINGS IN GERMANY WOULD
 8 UNDERMINE THE WORLDWIDE RAND DETERMINATION.**

9 Although Motorola has not sought to enforce a German injunction, it nevertheless has
 10 continued to use proceedings in Germany to further its strategy of undermining this Court's
 11 RAND determination. First, as part of the original German actions, on July 1, 2013 Motorola
 12 formally demanded that Microsoft provide an extensive and burdensome accounting, the
 13 ostensible purpose of which is to enable Motorola to claim patent infringement damages. (Exs.
 14 1 & 2, Letter from Krenz to Chrocziel; English Trans.) Motorola explicitly argued that it is
 15 entitled to collect past royalties in excess of the H.264 RAND royalty rates set by this Court.
 16 (Ex. 3 & 4, August 1, 2013 Rejoinder in No. 6 U 44/12; English Trans. at 8, 22.).

17 Second, on July 31, 2013, Microsoft was served with a complaint in a new lawsuit filed
 18 by Motorola in Germany, alleging that Motorola accepted an Orange Book offer from
 19 Microsoft in excess of the H.264 RAND royalty set by this Court and alleging that this
 20 purportedly accepted offer permits it to recover past patent infringement damages in excess of
 21 the H.264 RAND royalty rates set by this Court. (Ex. 5, Complaint in 2 O 79/13 with English
 22 Trans. at 8–13.) The Orange Book offer in question was an offer Microsoft originally made on
 23 December 23, 2011, and modified on February 3, 2012 and August 31, 2012. (Dkt. No. 655
 24 Ex. 1 at 7; Dkt. No. 656 Ex. A at 1.) Although Microsoft had already committed to pay RAND
 25 royalties as determined by this Court, Microsoft made these offers while under the threat of an
 26 injunction in Germany. Motorola originally rejected these offers, but then claimed to accept on

1 January 31, 2013, while insisting on additional conditions that made its “acceptance” a
 2 counteroffer. (Dkt. No. 656 Ex. A at 3–4.)

3 Microsoft sought a stay of these actions, which Motorola initially opposed. (Ex. 4 at 7–
 4 13.) However, following the pretrial conference in this case on August 13, 2013, all of these
 5 actions—the four original H.264 infringement actions (now on appeal), and the new contract
 6 action—were suspended upon Motorola’s application with Microsoft’s consent. (Exs. 6–15
 7 (Orders with English Trans.) The “stays” may be lifted at any time on application by either
 8 Motorola or Microsoft (in other words, either party may unilaterally re-start the German
 9 proceedings).

10 **A. Motorola Consented To A Worldwide RAND Determination, And The Court-
 11 Determined RAND Rate Applies To Motorola’s German H.264 Patents.**

12 In June 2012, Motorola agreed to a bench trial determining the worldwide RAND
 13 royalty. (Ex. 16, June 14, 2012 Hearing Tr. at 41:16–43:23.) In April 2012, in opposing the
 14 Court’s preliminary injunction, Motorola had explicitly affirmed that this Court has jurisdiction
 15 to adjudicate the worldwide terms of Motorola’s RAND commitments:

16 [THE COURT:] It seems to me that those facts strongly imply that I have
 17 jurisdiction to adjudicate the terms of the ITU agreement on a worldwide basis.
 And you’ve just said, quite passionately, “Judge, no, that’s just not right.”

18 MR. JENNER: I’m saying Your Honor does have jurisdiction to deal with that.
 19 (Ex. 17, April 11, 2012 Hearing Tr. at 40:13–19.) Motorola specifically confirmed that the
 20 Court’s jurisdiction extended to the determination of worldwide RAND terms for a license
 from Motorola to Microsoft—explicitly including Germany:

21 And to the extent Your Honor finds something different from Germany that you
 22 don’t agree with, Your Honor will have the opportunity, should you deem it
 appropriate, simply to tell Motorola to pay back the difference in Germany.
 23 That’s not an encroachment on your jurisdiction. I guess that goes to the comity
 part as well. That’s not an encroachment on your jurisdiction. You will simply
 24 find that the court didn’t determine a RAND rate in Germany. You did
 determine a RAND rate in Germany, to the extent that Motorola ought to pay
 25 some German money back to Microsoft. Microsoft has got a damages claim for
 that money, and that’s a damages claim, it’s not irreparable harm.

1 (*Id.* at 28:7–19. *See also id.* at 32:10–11 (court would have the authority to later reject a
 2 German royalty rate “as not being RAND”); Ex. 18, May 18, 2011 Hearing Tr. at 14:3–5 (“I
 3 don’t mean to suggest for a second that the court can’t do that [set a RAND rate]. The court
 4 can do that.”).)

5 Consistent with Motorola’s explicit concessions, the November RAND royalty trial
 6 determined the RAND royalty for Motorola’s worldwide H.264 and 802.11 portfolios. The
 7 two H.264 patents Motorola asserted in Germany are part of the Krause ’419 (EP 0538667)
 8 and Wu ’968 (EP 0615384) patent families. While Motorola knew that a RAND royalty for its
 9 worldwide H.264 patents was at issue, Motorola focused on the claims of the U.S. Krause and
 10 Wu patents, noting only that the German court had already found infringement of their German
 11 counterparts. (*See* Dkt. No. 462, Motorola’s Proposed Findings of Fact and Conclusions of
 12 Law ¶¶ 262–75, 335, 337; *see generally* 11/19/12 Tr. (Drabik).) Motorola did not argue that
 13 its European patents had value distinct from or greater than their U.S. counterparts. In its April
 14 2013 Findings of Fact and Conclusions of Law (Dkt. No. 673, “FFCL”), the Court made
 15 findings specific to the Krause and Wu families (including all worldwide counterparts) (FFCL
 16 ¶¶ 165–73, FFCL ¶¶ 174–84), and ultimately set the worldwide RAND royalty for Motorola’s
 17 H.264 patents at 0.555 cents per unit (FFCL ¶ 537).

18 **B. Motorola’s Conduct In Germany Was An Attempt To Avoid The RAND
 19 Royalty Determined By This Court.**

20 **1. Motorola Urged The German Court To Disregard The Worldwide
 21 RAND Royalty.**

22 In briefing filed in Germany on August 1, 2013, as part of the appeal of its H.264
 23 infringement action, Motorola unequivocally argued that this Court’s decision should be
 24 disregarded in valuing the German H.264 patents:

25 [A] decision by the US court on a “reasonable” license rate for the German
 26 patents in suit would not be eligible for recognition, because in making its
 assessment on the German property rights the US court applies only the

1 standards of US patent law (in particular with regard to so-called “means plus
 2 function” claims), and thereby makes a devaluation, which simply cannot apply
 3 to German patents. This obviously is incompatible with major principles of
 German Law, namely with those which define the subject of the German
 property right on a statutory basis.

4 (Ex. 4 at 14.) Motorola argued that this Court “expressly determined in its April 25, 2013
 5 order that *Krause* was of great technical value,” and that this Court “expressly finds great
 6 technical value” for the Wu patent as well. (Ex. 4 at 17, 19.) Motorola suggested that the sole
 7 reason that the Krause and Wu patents did not result in high RAND royalties for the H.264
 8 portfolio was that this Court viewed their claims as likely limited to hardware encoders and
 decoders, and not extending to software. (Ex. 4 at 21.) Motorola then contended that the
 9 German court should ignore the worldwide RAND royalty set by this Court, because German
 10 patent law does not limit such means-plus-function claims to disclosed hardware
 11 implementations:

12 [T]he reduction applied by the Seattle court for a supposed limitation to
 13 hardware devices (based on the formulation as “means-plus-function” claims
 14 under U.S. patent law) simply cannot be applied in Germany.

15 (Ex. 4 at 22.) According to Motorola, “it is not rationally plausible any longer how [Microsoft]
 16 can believe to be entitled to refer to the assessments made in the parallel U.S. proceedings for
 17 justifying a low royalty rate. . . . This will not be successful.” (Ex. 4 at 23.)

18 Given Motorola’s agreement that this Court would determine a worldwide RAND rate
 19 for its H.264 patents, and its counsel’s repeated assurances that if the Court set a worldwide
 20 RAND rate different from a rate set by a German court, Microsoft could recover the difference
 21 as damages, this position is astonishing. Motorola knew that the value of its European patents
 22 (and German equivalents) was at issue in the November RAND trial, yet it never advanced the
 23 argument it does now—that the means-plus-function limitations, even if applicable to the U.S.
 24 patents, should not affect the value of foreign counterparts because German (or any other
 25 country’s) patent law would treat Krause and Wu differently. By failing to make that

1 argument, Motorola tried to seed this Court's worldwide RAND determination with a loophole
 2 that it then attempted to use in Germany to evade this Court's ruling.

3 Moreover, this issue was flagged for Motorola well in advance of the RAND trial. On
 4 August 10, 2012, Microsoft served Motorola with the Rebuttal Expert Report of its H.264
 5 Expert, Michael Orchard, which explained why the claims of the Krause '419 and Wu '868
 6 patents are limited to hardware implementations. (Ex. 19, Orchard Reb. Rpt. ¶¶ 8, 110–113
 7 (Krause), 147–150 (Wu).) Orchard specifically noted the issue of potentially differing
 8 interpretations of the foreign counterparts of these patents. (*Id.* ¶¶ 114 (“I understand that
 9 ‘means’ elements in Germany are not interpreted as they are in the United States.”), 151
 10 (same).)

11 On September 20, 2012, Motorola's H.264 expert Timothy Drabik responded to
 12 Orchard's report in a supplemental expert report. Drabik stated that one of ordinary skill
 13 reading Krause and Wu would understand that they covered software, but Drabik made no
 14 distinction between the U.S. patents and the German (or any other foreign) counterparts. (Ex.
 15 20 (Drabik Supp. Rpt.) ¶¶ 18–19, 28–30.) Drabik's trial testimony was the same—in
 16 particular, Drabik never testified that the European counterparts of Krause and Wu might have
 17 broader scope, indicating potentially higher value. (11/19/12 Tr. (Drabik) 41:20–42:2.) The
 18 Court disagreed with Drabik because Motorola presented no evidence to support his
 19 arguments, and found that both the Krause '419 patent and the Wu '968 patent were limited to
 20 hardware implementations. (FFCL ¶¶ 173, 182.)²

21 Motorola was well aware in the Fall of 2012 of the issue it would later seize upon in
 22 urging the German court to disregard this Court's RAND ruling. Motorola could have made
 23 this argument for enhanced value for its German H.264 patents before this Court in November
 24

25 ² As to Wu, the Court found that one claim of the U.S. '968 patent may not be limited to hardware—but that
 26 Motorola had provided no evidence that this claim was essential to the H.264 standard. (FFCL ¶ 183.)

1 2012, but it intentionally declined to do so. Motorola then attempted to use this tactic to argue
 2 in other courts that the worldwide RAND rate determined by this Court should be ignored.

3 **2. Motorola Told The German Court That Microsoft Was Not A Willing
 4 Licensee Despite These Proceedings.**

5 In the same August 1, 2013 German brief, Motorola advanced additional arguments
 6 inconsistent with and seeking to undermine this Court's RAND determination. Motorola
 7 argued to the German court that Microsoft was not a "willing licensee" despite both the
 8 proceedings in this case and Microsoft's Orange Book offer of 1-2 Euro cents per unit. (Ex. 4
 9 at 25–26 ("Defendants in the present proceedings cannot be qualified as 'willing licensees'
 10 under any conceivable point of view.").) Motorola told the German court that Motorola "has
 11 demonstrated many times why the offered license rates" of 1-2 Euro cents for the two H.264
 12 patents (which exceeds by at least a factor of four the Court-determined worldwide rate), "are
 13 unreasonable." (Ex. 4 at 25.) Motorola claimed that Microsoft had "shown [itself] to be
 14 unwilling to accept a binding royalty rate determination by a third party" because it had not
 15 subjected itself to the Orange Book "Road B" Section 315 procedure. (Ex. 4 at 25.) Finally, in
 16 response to Microsoft's position that these proceedings, in this Court, are the proper place for
 17 that determination, Motorola accused Microsoft of attempting "to mix the U.S. proceedings up
 18 with the present proceedings and torpedo the German infringement action." (Ex. 4 at 25.)

19 **3. Motorola's New Contract Case Is An Effort To Capture Hold Up
 20 Value.**

21 Motorola's claimed "acceptance" of a Microsoft Orange Book offer for royalties far in
 22 excess of the Court-determined RAND royalty, and its contract lawsuit seeking to collect those
 23 royalties, are antithetical to these proceedings on multiple grounds. The rate of 1-2 Euro cents
 24 per unit is more than four times higher than the 0.555 US cent per unit rate that represents the
 25 most Motorola is entitled to for its entire worldwide H.264 portfolio. As noted above, the
 26 Orange Book offer was an offer Microsoft originally made on December 23, 2011, and

1 modified on February 3, 2012 and August 31, 2012 (Dkt. No. 655 Ex. 1 at 7; Dkt. No. 656 Ex.
 2 A at 1)—an offer, significantly, made while Motorola was urging the Ninth Circuit to overturn
 3 the preliminary injunction that barred Motorola from enforcing its German injunction, thus
 4 exposing Microsoft to a significant hold up threat. Motorola’s attempt to retroactively
 5 “accept” that offer is a last-gasp effort to seize hold up value to which it is not entitled.

6 At the August 13, 2013 pretrial conference, Motorola suggested that Microsoft was
 7 taking inconsistent positions with respect to the Orange Book offer—arguing, on the one hand,
 8 that Motorola “had to accept the offer in Germany” as a matter of antitrust law, but that on the
 9 other hand, the supposed acceptance was inconsistent with this Court’s exercise of jurisdiction.
 10 (Ex. 21, Pretrial Conf. Tr. at 56:11–21.) There is no inconsistency. As the Court is aware from
 11 *Daubert* briefing, the Orange Book procedure may well be inconsistent with European antitrust
 12 law (Dkt. No. 822 at 15–18), but Motorola’s action in Germany forced Microsoft to make an
 13 Orange Book offer anyway, at rates much higher than RAND, in an attempt to head off a
 14 German injunction. Motorola rejected that offer, and Microsoft has argued that Motorola’s
 15 rejection of this supra-RAND offer violated European antitrust law. And even if Motorola had
 16 accepted that supra-RAND offer, as Motorola’s counsel long ago explained, “Motorola ought
 17 to pay some German money back to Microsoft” because “Microsoft has got a damages claim
 18 for that money.” (Ex. 17 at 28:15–19.)

19 **III. MOTOROLA’S AGREEMENT TO LEAVE THE STAYS IN PLACE WOULD
 20 PRESERVE THE STATUS QUO AND AVOID THE NECESSITY OF
 21 INTERVENTION BY THE COURT.**

22 Motorola originally filed the German actions in July 2011, well after this action was
 23 underway. (9/3/13 Tr. (Killough) 12:9–14.) Motorola pursued an injunction in Germany on its
 24 H.264 patents despite knowing that it could obtain a RAND royalty here. (*Id.* 11:1–12:8.) The
 25 jury found that Motorola’s conduct in Germany breached its contract with the ITU—it awarded
 26 damages for Microsoft’s relocation in Germany, and found that Motorola’s pursuit of

1 injunctions on H.264 patents was a breach. (Dkt. No. 909, Verdict Form.) Motorola had no
2 reason to file and maintain the German actions other than to attempt to extract concessions
3 from Microsoft in breach of its ITU contract. Now, especially given the jury verdict and the
4 RAND determination, Motorola has no reason whatsoever to pursue H.264 actions against
5 Microsoft in Germany or anywhere else. Motorola should simply accept the RAND royalties
6 that Microsoft has tendered and drop its German suits. However, so long as Motorola agrees to
7 leave the stays in place and not initiate any other action against Microsoft related to Motorola's
8 SEPs, absent seeking leave from this Court, Microsoft believes that action from this Court is
9 not necessary.

10
11 DATED this 16th day of September, 2013.

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CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
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25 DATED this 16th day of September, 2013.
26

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